Supreme Court of the United States

OCTOBER TERM, 1948

No. 363

FELIX T. BOYLAN, *et al.*,

Petitioners,

vs.

LOUIS DETRIO, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY BRIEF

SOL M. SELIG,
Attorney for Petitioners,
No. 60 East 42d Street,
Borough of Manhattan,
New York 17, N. Y.

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Preliminary Statement

In view of the nature of the respondents' brief, submitted in opposition to the petition for a writ of certiorari, we are constrained to submit this reply brief.

The Argument

I.

Respondents, in their brief in opposition, under the heading "Statement", state that they "based and bedrocked their appeal upon the admitted testimony of the two defendants in the court below" (p. 4), and then proceed to quote from the opinion of the Court of Appeals (R. 2276-7). They wholly fail to explain or comment upon the testimony given by the petitioner, Boylan, which

immediately follows the part quoted by the Court of Appeals in footnote "5" (R. 2277),—which we have set out in full on page 18 of our main brief.

Counsel for respondents further completely ignore the subsequent uncontradicted testimony of petitioner, Boylan, with reference to the required capital contribution to be made by respondent, Louis Detrio, as a condition precedent, and which he (Louis Detrio) admittedly failed to make.

This omission on the part of respondents is most significant. It clearly demonstrates that they too have fallen into the same grave error,—as did the Court of Appeals. Their claim of the existence of an oral agreement for the re-entry of the respondent, Louis Detrio, as a partner, into the existing partnership, is predicated solely upon a minute portion of the testimony of the petitioner, Boylan, torn out of context, completely disregarding the subsequent pertinent testimony and all the facts developed upon the trial, relating to this subject matter.

II.

The argument of counsel for respondents that the provisions of Section 98 (1) (e) of the New York Partnership Law, have no applicability "because at the time the oral agrement was formed, the articles of partnership expressing the agreement into which respondents entered had not been executed and were not recorded" (p. 6) is absolutely contrary to the facts and therefore grossly misleading.

The Court of Appeals, in footnote 1, subdivision c, (R. 2271) stated that at the conclusion of the evidence the respondents "in order to conform the pleadings to

the proof" further amended paragraph 20 of the amended complaint by alleging that the oral agreement entered into on or about February 28, 1945, "was amendatory to and a part of the original articles of partnership of date February 28, 1943, as subsequently amended, except as to identities and interests of the partners, the life of said partnership being the same term as expressed in the original partnership agreement as set out in Exhibit 'A' hereto".

The original articles of partnership of February 28, 1943 (Exhibit A; R. 22-30), and the subsequent amendment of May 15, 1943 (Exhibit B; R. 30-33) were signed by all of the partners and were duly recorded in the office of the Clerk of New York County, where the partnership had its principal place of business. Defendants' Exhibit D-2 (R. 299-303) conclusively established that the foregoing documents were signed and recorded in the early part of the year 1943.

Counsel for respondents are therefore in grave error when they claim that on February 28, 1945, when the oral agreement was made,—under which respondent, Louis Detrio, was to re-enter the partnership, and respondent, Sylvester Detrio was to reduce his percentage of the profits,—the original articles of partnership as amended had not been signed and recorded.

We respectfully submit that respondents' argument is wholly without merit.

III.

Counsel for respondents fully realize that under the provisions of Section 98 (1) (e) and Section 53 of the New York Partnership Law, and the controlling authorities, the oral agreement of February 28, 1945, did not legally amend the original articles of partnership, as

subsequently amended, and is wholly without any legal force and effect.

With that in mind, counsel for respondents therefore advance the argument that the oral agreement of February 28, 1945, created an oral partnership "as a purported unlimited one, and was operating with full actual effect". They rely upon the authority of *Smith* v. *Maine,* 145 (N. Y.) Misc. 521, for the proposition thus advanced. In fact, they claim that this case "militates diametrically upon the position of the respondents" (p. 6).

In view of this unequivocal statement, we are taking the liberty of quoting at length from the official report of *Smith* v. *Maine* (*supra*). The Court, in the *Smith* case discussed with great clarity and succinctness the fundamental principles of partnership law, and the vital elements essential for the creation of a valid and binding partnership agreement. At pages 525-6 of 145 (N. Y.) Misc., Taylor, J. stated:

> "I will now discuss the relevant law of partnership: (1) The burden of proving the pleaded agreement of partnership (oral and at will) is upon Miss Smith. If the evidence, quality considered, is evenly balanced on that issue, a finding of partnership cannot be made. (2) A partnership may only arise *by mutual agreement* between two or more persons; it exists as to its members where they have agreed to combine their labor, property, and skill, or some of them for the purpose of engaging in any lawful trade or business, and share the profits and losses as such between them. (Partnership Law § 2, being Consolidated Laws of 1909, c. 39, in effect February 17, 1909; Kent's Comm. Lecture 43 (1), relating

to the nature, creation and extent of partnerships). (3) If there is no contract *to be partners*, there is no partnership (*Gordon* v. *Farrell*, 157 App. Div. 409, 410), for such an agreement is the foundation of partnership. (*Smith* v. *Dunn*, 44 Misc. 288, 290, 294, 295). (See, also, *Heye* v. *Tilford*, 2 App. Div. 346, 349, 350; affd. 154 N. Y. 757.) (4) Loose and indefinite talk cannot be made the basis of a finding of a partnership agreement (*Wilcox* v. *Williams*, 19 App. Div. 438, 439, 440). (5) Such a contract 'must be established to the entire satisfaction of a court of equity before its intervention can be demanded.' (Quoted from *Farley* v. *Hill*, 150 U. S. 572, 577, in *Gordon* v. *Farrell*, *supra*). (6) Where the testimony claimed to establish a partnership agreement is lacking in probity and weight and the circumstances are clearly against the probability of its existence, the court's credulity would be too greatly strained by a finding that such agreement was made. (See *Summa* v. *Masterson*, 215 App. Div. 159, 161, 162.) (7) A 'joint undertaking to share in the profit and loss' must be established (*Pattison* v. *Blanchard*, 5 N. Y. 186, 189); and an 'indispensable essential' is 'a mutual promise or undertaking of the parties to share in the profits * * * and submit to the burden of making good the losses'. (*Reynolds* v. *Searle*, 186 App. Div. 202, 203; read also *Cole* v. *Rome Savings Bank*, 96 Misc. 188; *Stoller* v. *Franken*, 171 App. Div. 327; *Chappell* v. *Chappell*, 125 App. Div. 127, affd., 193 N. Y. 653; *Bogardus* v. *Reed*, 160 App. Div. 294; *Thomas* v. *Springer*, 134 App. Div. 640). (8) A proprietary interest in the business is also necessary, or there is no partnership (*Heck* v. *Voelkle*,

95 Misc. 692). Relevant citations might be extended; but the foregoing are sufficient." (Italics by the Court).

Applying the above principles of law to the uncontroverted facts and testimony adduced in the case at bar,—fully discussed and quoted under Point II of our main brief (pp. 17-27),—we find: (a) That the conversations had in February, 1945, between petitioner, Boylan, and respondent, Louis Detrio, were merely tentative in form and of an exploratory nature. The effective date of his re-entry into the firm had not been determined, and no terms were discussed. It was specifically agreed that all these matters were left for future discussion and were to be contained in a written agreement, to be signed by all of the partners, and to be an amendment to the original articles of partnership; (b) There was never at any time a complete meeting of the minds of all parties in interest; (c) There was merely a proposed assignment or transfer of various interests in the future profits, but no agreement on the part of the respondent, Louis Detrio, to share in the losses; and (d) The failure of the respondent, Louis Detrio, to make his required capital contribution and thus acquire a proprietary interest in the partnership.

That the oral agreement of February 28, 1945, did not constitute a partnership agreement is best evidenced by the fact that the remaining partners did not in fact transfer any portion of their interests in the partnership to the respondent, Louis Detrio, and never recognized him as a partner.

Even in cases of general partnership, as distinguished from limited partnerships, Section 40 (7) of the New York Partnership Law specifically provides as follows:

"§ 40. *Rules determining rights and duties of partners.* The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules. * * *

7. No person can become a member of a partnership without the consent of all the partners."

This Court, in the recent case of *U. S.* v. *U. S. Gypsum Co.*, 333 U. S. 364, 394, clearly stated that the provisions of Rule 52 (a) of the Federal Rules of Civil Practice apply to inferences drawn from documents or undisputed facts, and they should not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial Court to judge the credibility of the witnesses.

In the light of the foregoing, we respectfully submit that the findings of the trial Court are fully supported by the uncontradicted facts and documentary evidence of the respondents and their witnesses, as contained in the record. These findings cannot be said under any circumstances to be "clearly erroneous". On the contrary, it was the Court of Appeals which made factual determinations, decisive of vital rights, which are wholly contrary to the uncontroverted facts. These findings are therefore "clearly erroneous" and should be reviewed by this Court.

IV.

The argument advanced by the respondents under Point III of their brief (p. 7) is predicated upon a false premise. They argue that the opinion of the Court of Appeals is silent on the issues of fraud, conspiracy, con-

version and misappropriation, and that on the remand "presumably" these matters would be properly inquired into under the directions of the Court of Appeals.

The directions contained in the opinion (fol. 2280, R. 2279), as well as in the mandate (fol. 2281, R. 2279-80) are clear and unequivocal. They are: (1) to find that by oral agreement respondent, Louis Detrio, re-entered the partnership as of March 2, 1945, and that as of the same date the respondent, Sylvester Detrio's percentage of the profits was reduced from 8% to 5%; (2) to take and state an account on that basis; and (3) to enter judgment accordingly. The District Court must needs follow these directions and cannot go into any other matters. Those matters were already determined and the determination was in favor of petitioners.

The authorities cited on pages 8 and 9 of the respondents' brief are not in point. A few instances will suffice.

The case of *Pierce* v. *Feno*, 184 N. Y. S. 851, primarily involved questions of fact arising from dealings between the parties over a period of 11 years. In *Martin* v. *Peyton*, 246 N. Y. 213, the Court had under consideration a loan secured by collateral and a share in the profits of the business. The Court held that the transaction taken as a whole did not create a partnership relationship. The case of *Casola* v. *Kugelman*, 33 (N. Y.) App. Div. 428, affd. 164 N. Y. 608, simply holds that where a limited partnership is formed, the partners are bound by the terms of the agreement.

CONCLUSION

We respectfully submit that the arguments advanced by the respondents in their brief are wholly without merit. Their utter failure to discuss the facts and authorities set forth in our main brief is tantamount to a tacit acknowledgment by them of the validity of the controlling authorities cited by us and their applicability to the facts in the case at bar.

The petition for the writ should be granted and certiorari issue out of this Court so that the decision and judgment of the Court of Appeals may be reviewed.

Respectfully submitted,

SOL M. SELIG,
Attorney for Petitioners,
No. 60 East 42d Street,
Borough of Manhattan,
New York 17, N. Y.

Dated: New York, N. Y.,
November 17, 1948.